



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-25\*

### FACTS:

You are currently employed full-time as a police officer in the Division of Law Enforcement of the state Department of Fisheries, Wildlife and Environmental Law Enforcement (the Department). *See* G.L. c. 21, §6. It is the Department's (and your) duty "to enforce all penal laws which it is the duty of any agency within the executive office of environmental affairs to enforce . . . ." *Id.* §6A. One such agency is the Department of Environmental Protection (DEP), G.L. c. 21A, §7, which enforces the state Wetlands Protection Act, G.L. c. 131, §§40, 40A (the Act). Violation of the Act is punishable by a criminal fine (or a DEP civil penalty, *see* G.L. c. 21A, §16) of not more than \$25,000 or by imprisonment for not more than two years. G.L. c. 131, §40, last paragraph. Therefore, you inform us that your duties as an environmental police officer include enforcing the Act.

You are also a resident of the Town of Erving, and wish the Selectmen to appoint you as a member of the Town's unpaid Conservation Commission. *See* G.L. c. 40, §8C. The Conservation Commission has primary responsibility for enforcing the Act within the Town by issuing "orders of conditions," subject to administrative appeal seeking a superseding order of conditions by DEP. G.L. c. 131, §40.

### QUESTION:

May you serve as an unpaid Conservation Commission member while remaining employed as an environmental police officer?

### ANSWER:

Yes, subject to the following limitations in each position.

### DISCUSSION:

As an environmental police officer, you are a "state employee" for the purposes of the state conflict of interest law. G.L. c. 268A, §1(q). If you were appointed as a Conservation Commission member, you would also be a "municipal employee" in that capacity. *Id.* §1(g) (defining "Municipal employee" to include "a person . . . holding an office . . . in a municipal agency . . . by appointment . . . without compensation . . . on a . . . part-time . . . basis").

#### 1. Restrictions as a Conservation Commission member (§4).

##### (a) The state/municipal "purview" limitation.

We must first decide, in effect, whether you may hold both positions simultaneously at all. The answer turns on the proper application of G.L. c. 268A, §4,<sup>1/</sup> and especially of the following provision of its second-to-last paragraph: "No such elected or appointed [municipal] official may vote or act on any matter which is within the purview of the [state] agency by which he is employed . . . ." Read in isolation, this provision might seem to prohibit you from virtually all activities as a Conservation Commission member, since that Commission's principal responsibility, enforcement of the Act within the Town, is also entirely within your state Department's "purview." *See EC-COI-92-22.* For the following reasons, however, we reject such a broad application of the §4 "purview" limitation to an unpaid municipal official, in favor of a narrower application limited to situations when you are "acting as agent" for the Town or its Conservation Commission.

We begin with the recognition that a statute is to be interpreted “according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *O’Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). See *EC-COI-92-17*; 92-6. Thus, we first examine “all [the] words” of G.L. c. 268A, §4.

For present purposes, §4 contains two distinct operative restrictions on a state employee’s outside activities. Section 4(a) generally prohibits a state employee from receiving compensation from anyone other than the state in relation to any particular matter in which the state is a party or has a direct and substantial interest. In your role as a Conservation Commission member, §4(a) will not restrict you at all, because you will not receive any compensation in that position. In addition, however, §4(c) prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone in connection with any particular matter in which the state is a party or has a direct and substantial interest.

The “purview” limitation quoted above appears in §4 as part of the “municipal exemption,” constituting the statute’s second-to-last paragraph. That paragraph reads in its entirety:

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

Thus, this “municipal exemption” removes state employees who are also municipal officials from application of the operative provisions of §4(a) and (c), but only to a limited extent. That extent is specified in the exemption’s second sentence, the “purview” limitation. The language and structure of this paragraph indicates that the second sentence is meant solely as a limitation on the exemption granted by the first sentence. See *EC-COI-92-6*. See also 1990-1991 Op. Mass. Att’y Gen. No. 5 (June 12, 1991) (Legislature’s placement of new sentence in paragraph of statute indicates intention to limit sentence’s effect to that paragraph, rather than apply it to entire section). Therefore, the “purview” limitation will apply to you as an unpaid municipal official, not in all your Conservation Commission activities, but only in the narrow circumstances when you are acting as agent for the Commission or the Town.

This analysis is identical to that we have consistently applied to three similar provisions of G.L. c. 268A, all of them involving statutory limitations on exemptions. In each case, we construed the limitation’s scope as no broader than the underlying operative provision from which the exemption is granted. Thus, in *EC-COI-87-36* and *EC-COI-82-106*, we concluded that provisions limiting the “selectman’s exemption” from the multiple-office holding restrictions of §20 did not apply to selectmen who were special municipal employees and thus not in need of the exemption. In *EC-COI-92-6*, we read a limitation on an exemption of certain construction contractors and their personnel from the definition of “State employee” in §1(q) as not applying to persons who were not “State employees” initially under the primary statutory definition.

Most significantly, in *EC-COI-92-8*, we refused to apply this very “purview” limitation to a state legislator who was also a municipal official, because the legislator could rely instead on the separate “legislator’s exemption” from §4, containing less restrictive limitations. In that opinion, citing *EC-COI-87-36* and *EC-COI-82-106*, we reasoned, “Reliance on either exemption would mean that any restrictions of the other exemption would not apply . . . .” This analysis controls your case; since the main operative provisions of §4 will restrict you as an unpaid Conservation Commission member only to the extent that you are acting as agent, you will be in need of the “municipal exemption,” hence subject to its “purview” limitation, only to the same extent.

The legislative history of the “municipal exemption” also supports this conclusion. As we have previously recognized, most recently in *EC-COI-92-22*, the Legislature enacted this exemption in St. 1980, c. 10 to mitigate a harsh application of §4, which would otherwise virtually prohibit state employees from holding municipal office in some situations. Thus, immediately before this exemption’s enactment, this Commission had held that §4(a) prohibited state employees from many activities as compensated selectmen, because these activities would necessarily be in relation to particular matters in which the state was a party or had a direct and substantial interest. E.g., *EC-COI-79-123*; 79-3. As discussed below, however, these opinions recognized that §4(c)

would prohibit uncompensated municipal officials only from acting as agent in these state-related matters.

Thus, in order to adopt the broader reading of the “purview” limitation, as prohibiting uncompensated municipal officials from participating in all matters within their state agency’s purview even when they are not “acting as agent,” we would need to ascribe to the Legislature that enacted St. 1980, c. 10 an intention to restrict state employees’ activities as uncompensated municipal officials further in some respects than the main operative provisions of §4 (specifically §4(c)), as construed in this Commission’s prior opinions. But nothing in the legislative history of c. 10 indicates any intention to impose such further restrictions. Rather, the sole declared purpose of c. 10, in the words of both its title<sup>2</sup> and its emergency preamble, was to ensure “that a person shall not be prohibited from holding an elective or appointive office in a city, town or district because such person is a state or county employee.” The bills that resulted in c. 10 (H. 1941 and H. 5893 of 1980) were advocated by municipal officials as a response to *EC-COI-79-123*. In fact, both houses amended the legislation to make its effective date retroactive to the date this Commission issued that opinion, November 14, 1979. *See* St. 1980, c. 10, §3; 1980 S. Jour. 88 (Feb. 21). In short, the c. 10 legislative history, very much like that we examined in *EC-COI-92-6*, is “unusually clear and consistent [and] discloses no legislative purpose to impose further restrictions” on the exempted persons.

Our narrow application of the “purview” limitation only to uncompensated municipal officials’ “agent” activities is also consistent with our many prior opinions applying the “municipal exemption.” *EC-COI-92-22*; *92-8*; *90-8*; *90-4*; *88-21*; *86-2*; *85-68*; *85-41*; *84-120*; *84-103*; *83-26*; *82-173*; *82-164*; *82-89*; *82-52*; *82-39*. For, in virtually all these opinions, the municipal official was compensated.<sup>3</sup> Thus, §4(a), the “municipal exemption,” and its “purview” limitation operated in these cases to prohibit the state employees from all participation as municipal officials in matters within the purview of their respective state agencies.

#### **(b) Acting as agent.**

For the reasons just discussed, §4(c), operating with the “municipal exemption,” will prohibit you, as an unpaid Conservation Commission member, from acting as agent in connection with particular matters within the purview of your state Department. It remains to define how you might “act as agent” as a Conservation Commission member.

In general, a public employee acts as agent for the purpose of G.L. c. 268A when he or she speaks or acts on behalf of another in a representational capacity. *See Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992); *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610-11 (1984), *habeas corpus granted on other grounds sub nom. Cola v. Reardon*, 787 F.2d 681 (1st Cir. 1986). We have repeatedly given as examples of acting as agent appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another’s spokesperson. *See, e.g., EC-COI-92-18*; *In re Reynolds*, 1989 SEC 423, 427; *Commission Advisory No. 13 (Agency)* (1988).

The only prior discussion that we have found of a state employee’s acting as agent in his or her position as a municipal official appears in *EC-COI-79-123* and its judicial review. That opinion is especially significant because, as discussed above, it was very much before the Legislature that enacted the “municipal exemption” in St. 1980, c. 10.<sup>4</sup> Although that opinion dealt with a compensated selectman, its final paragraph considers how §4(c) alone would apply if the selectman “refused compensation.” After paraphrasing §4(c), it continues:

This section does not prohibit you from participating in these matters [in which the state is a party or has a direct and substantial interest] as a selectman but it does require you to refrain from acting as the agent for your community vis-a-vis the state. To the extent that your duties as a selectman, as described in your town’s by-laws or as a matter of practice, require you to act as an agent in any such particular matters as and when they arise, you would be prohibited by section 4(c) from engaging in such representational activities. We suggest that you may want to take clear and definitive steps to indicate that you are abstaining from acting on behalf of the town in a representational capacity in order to avoid any suggestion that you may have violated this section of the law.

That opinion’s requester and other plaintiffs promptly sought judicial review of the Commission’s advice in the Supreme Judicial Court for Suffolk County. *McNamara v. Vorenberg*, No. 79-497 Civil. The Commission’s memorandum opposing a preliminary injunction in that case, while again primarily directed to §4(a), summarized

the Commission's application of §4(c) in this way: "he could participate as a selectman in matters which are of direct and substantial interest to the state provided he refrain[s] from acting as the agent for his community in dealings with the state." The single justice's December 17, 1979 memorandum denying the preliminary injunction,<sup>5/</sup> in part because no irreparable harm would befall the plaintiff selectmen or their town, observes: "No such harm can result from the appointment of an agent other than one of the plaintiffs to avoid violation of §4(c)." By thus implicitly recognizing that the ordinary activities of selectmen would not violate §4(c), the court agreed with the Commission's position that only "representational" activities are forbidden. Moreover, the views of that single justice, Robert Braucher, are entitled to special weight, as the Supreme Judicial Court itself later recognized,<sup>6/</sup> because he was previously a member of the Special Commission that drafted G.L. c. 268A, and an early and respected commentator on the new statute.<sup>7/</sup>

The Commission's and the court's view in that 1979 case, that a municipal official does not "act as agent" merely by discussing and voting as a board member, is consistent with judicial and Commission precedent in related contexts. First, before enactment in 1978 of the state Tort Claims Act<sup>8/</sup> rendered the distinction irrelevant, a long line of Supreme Judicial Court decisions held that, for municipal tort liability purposes, a municipal "officer" was not ordinarily an agent of the municipality. *See, e.g., Whitney v. City of Worcester*, 373 Mass. 208, 213-15 (1977) (discussing the history of this distinction<sup>9/</sup>); *Reitano v. City of Haverhill*, 309 Mass. 118 (1941).<sup>10/</sup>

Second, beginning in *EC-COI-81-158*, this Commission has consistently held that §4(c) and its municipal equivalent, §17(c), do not prohibit public employees who are unpaid board members of business organizations from participating in board discussions and votes even about subjects that are in connection with government particular matters, so long as they avoid acting as the organization's "agent," i.e., in a representational capacity, such as by appearing before, signing correspondence to, or making a telephone call to, a government agency. *See EC-COI-89-15; 88-17; 85-21; 83-145; 82-45*. Given the legislative purpose in enacting the "municipal exemption," discussed above, it would be odd indeed if its enactment served to prohibit state employees from activities as unpaid members of municipal boards that would be allowed to them as unpaid members of profit-making corporate boards. We do not attribute any such intention to the Legislature.

It follows that an unpaid municipal board member does not "act as agent" merely by participating in the ordinary business of the municipal board, including discussion and voting. Therefore, you may serve as an uncompensated member of the Erving Conservation Commission and may participate fully in its ordinary business, including discussing and voting on matters, such as orders of conditions under the Act, that are within the purview of your state Department. You may not, however, act as the Conservation Commission's or the Town's agent in connection with any matter within the Department's purview. For example, you could not appear at a DEP hearing on the Town's behalf to defend an order of conditions issued by your Commission (although you could appear on your own behalf, if you first made it clear that you were speaking or writing in your personal capacity only).

## **2.Restrictions as an environmental police officer (§§6, 17, 23).**

If you are appointed to the Conservation Commission, the conflict law will also restrict your activities in your role as an environmental police officer. Section 6 will generally prohibit you from participating as an environmental police officer in any particular matter in which the Town of Erving has a financial interest, because the Town, of which you will be an "officer," is a business organization for this purpose. *See, e.g., EC-COI-92-8; 89-2; 88-4*. Section 17 (the municipal equivalent of §4, discussed in part 1) will prohibit you from acting as an environmental police officer in relation to any particular matter in which the Town is a party or has a direct and substantial interest. Section 23 will prohibit you from using your position as an environmental police officer to secure an unwarranted privilege of substantial value for yourself or others (including the Town) (§23[b][2]), and from acting in that position in a manner that leaves a reasonable impression of undue influence resulting from your Town position (§23[b][3]).

While limited exemptions are available to you from each of these provisions,<sup>11/</sup> their cumulative effect will likely be to prevent you from performing your duties as an environmental police officer within the Town of Erving. *Cf. EC-COI-92-8* (advising potential state legislator of limits on his legislative work involving town where he was Selectman). You should discuss the practical implementation of this limitation with your Department superiors, if you pursue appointment to the Conservation Commission.

## Date Authorized: September 10, 1992

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1</sup>Section 19 of G.L. c. 268A will not restrict your Conservation Commission activities on the ground that the state, your employer, may have a financial interest in some of them, because the Commission and the Attorney General have repeatedly held that neither the state nor any state agency is a “business organization” for this purpose. *EC-COI-92-11*; 92-3 n.3; 85-67; *AG Conflict Opinion No. 30* (Apr. 25, 1963).

<sup>2</sup>An act’s title is evidence of legislative intent. See *Hemman v. Harvard Community Health Plan, Inc.*, 18 Mass. App. Ct. 70, 73 (1984); *EC-COI-92-6* n.2.

<sup>3</sup>In a few of these cases, the stated facts do not reveal whether the municipal official was compensated, and the opinions do not discuss the point. *EC-COI-88-21*; 86-2; 84-120; 82-164; 82-89. In only one prior opinion, *EC-COI-84-103*, is it clear from the discussion that the municipal official, a sewer commissioner, was unpaid. There, this Commission explicitly recognized that only §4(c) applied (as constrained by the “municipal exemption”), but then stated conclusorily that “board members necessarily function as agents of the town with regard to local sewage matters.” Our discussion here in text below undermines that unexplained statement.

<sup>4</sup>In addition to noting again that the Legislature made c. 10 retroactive to the date of that opinion, we also find it significant that a copy of the opinion is found in the Governor’s legislative file for c. 10, the permanent record of the act’s legislative history in the State Archives.

<sup>5</sup>The case never proceeded to argument on the merits before the full court, because the plaintiffs were satisfied with the Legislature’s prompt enactment of St. 1980, c. 10, which the Governor signed on February 28, 1980.

<sup>6</sup>*Sciuto v. City of Lawrence*, 389 Mass. 939, 948-49 (1983).

<sup>7</sup>Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* (1964).

<sup>8</sup>G.L. c. 258, initially enacted by St. 1978, c. 512.

<sup>9</sup>As the *Whitney* court pointed out (in criticizing the distinction as a basis of determining municipal tort liability), “many” of the court’s earlier decisions ended the inquiry once the actor was classified as a “public officer,” while other cases discussed municipal liability if public officers were engaged in “commercial” ventures on the municipality’s behalf. 373 Mass. at 214.

<sup>10</sup>We note that this line of cases is discussed at length in comprehensive memoranda by the the Winthrop Town Counsel that were before the Legislature and Governor when they enacted St. 1980, c. 10. These memoranda are found in the Governor’s legislative file for c. 10. See note 5, above.

<sup>11</sup>Section 6 will require you to disclose in writing your need to participate in any matter in which the Town has a financial interest to your Department appointing authority, who must then (1) assign it to another police officer; (2) assume it himself; or (3) determine that the Town’s financial interest in that matter (or class of matters, see *EC-COI-92-12* n.2; 90-5; 90-4) is not so substantial as to interfere with the integrity of your services to the state. Copies of your disclosure and this determination must be filed with this Commission.

The scope of the §17 prohibition would be limited to Conservation Commission matters if the Selectmen classified Conservation Commission members as “special municipal employees.” See G.L. c. 268A, §1(n). This might not resolve many problems for you, however, since most Town matters that would pose conflicts with your work as an environmental police officer are probably within the Conservation Commission’s jurisdiction.

Finally, you could avoid violating §23(b)(3) (though not §23[b][2]) by publicly disclosing your Conservation Commission membership to your Department appointing authority in writing.